[Cite as *Defreeze v. Lynch*, 2019-Ohio-699.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107090

WYTONYA DEFREEZE

PLAINTIFF-APPELLANT

vs.

XAVIER LYNCH

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-846253

BEFORE: Blackmon, J., E.T. Gallagher, P.J., and Sheehan, J.

RELEASED AND JOURNALIZED: February 28, 2019

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PATRICIA ANN BLACKMON, J.:

{¶1} Plaintiff-appellant, Wytonya DeFreeze, appeals from the judgment rendered on a defense verdict in favor of defendant-appellee, Xavier Lynch, in DeFreeze's personal injury action. DeFreeze assigns three errors for our review:

> I. The jury's verdict in this matter was against the manifest weight of the evidence.
>
> II. The trial court erred when it denied [DeFreeze's] motion for judgment notwithstanding the verdict.
>
> III. The trial court erred when it denied [DeFreeze's] motion for a new trial.

{¶2} Having reviewed the record and pertinent law, we affirm the decision of the trial court. The apposite facts follow.

{¶3} DeFreeze filed this complaint against Lynch, alleging that after putting Lynch on notice of defects in the back stairwell of her apartment, she fell on two separate occasions and sustained injuries. DeFreeze further alleged that in retaliation for notifying him of her injuries,

Lynch gave her a three-day notice to vacate the premises. DeFreeze set forth claims for negligence, negligence per se under R.C. 5321.04, and retaliatory eviction.[1] The matter proceeded to a jury trial from January 31, 2018 to February 2, 2018.[2]

{¶4} DeFreeze testified that in 2011, she and her husband, Damon, moved to an upstairs unit of the premises under a one-year lease for $600 per month. Over the next five years, they notified Lynch of various problems with the apartment, including cracks, a squirrel infestation, and plumbing issues. Although there are two stairwells leading to her apartment, they did not use the front stairs because they were "too steep," and by 2014, the back stairwell had become defective due to lack of lighting and loose or missing rubber stair treads. The DeFreezes testified that they told Lynch about these defects, but no repairs were made.

{¶5} DeFreeze testified that on June 6, 2014, she slipped and fell on the back steps due to a missing tread and lack of lighting. She sustained injuries to her knee and wrist; she was transported to the hospital by ambulance. DeFreeze told Lynch about her injury, but no repairs were made. DeFreeze testified that she fell again in the back stairwell in late December 2014, due to the same defects. In July 2015, DeFreeze sent a letter to Lynch identifying defects with the apartment, but she did not list the stair treads or lighting problem with the stairs. By September 2015, the couple had placed rental payments in escrow with the Cleveland Municipal Court. DeFreeze presented undated photographs of the stairs depicting missing or unattached stair treads, and she testified that the photographs depicted the condition of the stairwell at the

[1]Default judgment was entered against Lynch in 2016. However, the trial court vacated this ruling after Lynch averred that he never received the complaint, and the notice of default misstated the date of the default hearing due to an obliteration on the postcard. This court affirmed. *DeFreeze v. Lynch*, 8th Dist. Cuyahoga No. 103608, 2016-Ohio-3464.

[2]Trial was originally set for January 17, 2018, but Lynch failed to appear and his counsel told the court that his mother had been hospitalized. Later, at a March 2018 contempt hearing, Lynch was found in contempt of court and ordered to pay DeFreeze's counsel $1,000.

time of her falls. However, Damon admitted that after the second fall, he removed the rubber stair treads "to prevent further injury."

{¶6} DeFreeze further testified that after the couple began to escrow the rent, Lynch repeatedly confronted them about the rental payments. After an incident when Lynch's vehicle blocked theirs in the driveway, they became fearful and they reported him to his supervisors with the Cleveland Police Department. They maintained that Lynch was not cited for defects at the premises due to his friendships with housing court staff.

{¶7} Proceeding with the defense, Lynch testified that he diligently maintained the premises, and contractor Stanley Summers ("Summers") performed various repairs to the premises. Lynch asserted that the DeFreezes did not notify him of any defects with the stairs until after the June 2014 fall. He and Summers subsequently inspected the stairwell, but they did not observe any defects. Lynch stated that he asked DeFreeze to point out the defects to him, but she could not do so, and housing inspectors likewise found no defects. After DeFreeze fell again in December 2014, Lynch again inspected and found no defects. Lynch further testified that each time he sent a repair person to the premises, the DeFreezes called the police or prohibited the repair person from entering.

{¶8} With regard to the retaliation claim, Lynch testified that after the DeFreezes' June 2014 rent payment was returned for insufficient funds, he gave the couple a three-day notice to vacate. Later, in December 2014, he gave them a notice of termination of tenancy due to nonpayment. He also maintained that he did not initially receive notice of the rent escrow after it began in September 2015, because it was sent to the apartment and not to his residence.

{¶9} Summers testified on behalf of Lynch and indicated that the stair treads were in place and intact when he went there in June 2014, and again in December 2014. According to

Summers, on both occasions, he observed that the rubber treads for the back stairs were properly affixed and there were no defects. Summers also testified that during various occasions when he went to the apartment to perform repairs, the DeFreezes either made him leave, repeatedly made him move his vehicle, or threatened to call the police.

{¶10} The jury rendered a verdict in favor of Lynch and concluded that Lynch was not negligent in this matter. DeFreeze subsequently filed motions for judgment notwithstanding the verdict and for a new trial. The trial court denied the motions, and DeFreeze now appeals.

Manifest Weight of Evidence

{¶11} In her first assigned error, DeFreeze argues that the judgment on defense verdict was against the manifest weight of the evidence. She argues that she presented evidence that the back stairs of the apartment were defective and unlit, and this evidence was never rebutted during trial.

{¶12} In *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, the Ohio Supreme Court held that in reviewing the weight of the evidence supporting a civil judgment, the reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving evidentiary conflicts, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Id.* at ¶ 20.

{¶13} In order for a tenant to establish a landlord's negligence under common law premises liability, the plaintiff must show: (1) the existence of a duty; (2) a breach of that duty; and (3) an injury proximately resulting from the breach. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 21. However, where the matter involves a question of the existence of a hazardous condition or defect, actual or constructive notice of the hazard or defect is a prerequisite to a landlord's duty. *Waugh v. Lynch*, 8th Dist. Cuyahoga No. 100432,

2014-Ohio-1087, ¶ 10; *Heckert v. Patrick*, 15 Ohio St.3d 402, 405, 473 N.E.2d 1204 (1984). Further, a landlord has no common law duty of care regarding dangers that are open and obvious. *Robinson* at ¶ 35; *Packman v. Barton*, 12th Dist. Madison No. CA2009-03-009, 2009-Ohio-5282, ¶ 33 ("[I]f the danger resulting from the allegedly defective rear staircase was open and obvious to appellant, then the Bartons owed her no duty of care."). Darkness may be an open and obvious condition that obviates the landlord's duty to warn its tenant. *Carter v. Forestview Terrace L.L.C.*, 2016-Ohio-5229, 68 N.E.3d 1284, ¶ 19 (8th Dist.). The *Carter* court stated:

> The "step-in-the dark" rule relates to the proximate cause element of negligence and holds that "one who, from a lighted area, intentionally steps into total darkness, without knowledge, information, or investigation as to what the darkness might conceal, is guilty of contributory negligence as a matter of law." *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 276, 344 N.E.2d 334 (1976); *Johnson* [*v. Regal Cinemas, Inc*., 8th Dist. Cuyahoga No. 93775, 2010-Ohio-1761] at ¶ 30 (stating the rule mandates liability upon an individual who intentionally steps from a lighted area to total darkness, without investigating the possible dangers concealed by the darkness); *Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961, 927 N.E.2d 1161, ¶ 37 (2d Dist.) (noting that unlike the "open and obvious" doctrine that relates to the landlord's duty, the step-in-the-dark rule relates to the cause of the plaintiff's injury).

Id. at ¶ 19.

{¶14} A tenant may also establish a landlord's negligence under R.C. 5321.01 et seq., the Landlord-Tenant Act, for injuries proximately caused by the landlord's failure to fulfill the duties imposed by R.C. 5321.04(A). *Shroades v. Rental Homes, Inc.,* 68 Ohio St.2d 20, 427 N.E.2d 774 (1981). R.C. 5321.04 provides in pertinent part as follows:

> (A) A landlord who is a party to a rental agreement shall do all of the following:
>
> (1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;
>
> (2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas in a safe and sanitary condition;

(4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by him[.]

{¶15} A landlord's violation of the duties imposed by Ohio's Landlord-Tenant Act constitutes negligence per se, so that proof of a landlord's violation of the statute dispenses with the plaintiff's burden to establish the existence of a duty and the breach of that duty. *Allstate Ins. Co. v. Henry*, 12th Dist. Butler No. CA2006-07-168, 2007-Ohio-2556, ¶ 9-10, citing *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406, 727 N.E.2d 1277, syllabus. However, the tenant must still prove that the landlord had actual or constructive notice of the condition causing the statutory violation. *Henry* at ¶ 11; *Packman* at ¶ 15. Landlords are not liable where they "neither knew nor should have known of the factual circumstances that caused the violation." *Mounts v. Ravotti*, 7th Dist. Mahoning No. 07 MA 182, 2008-Ohio-5045, ¶ 30, quoting *Sikora* at 498. A landlord may be deemed to have constructive notice of a defect if it "existed for such a length of time that the landlord, by exercising reasonable care, should have discovered it." *Waugh* at ¶ 10; *Coeurvie v. McGonigal*, 9th Dist. Summit No. 27095, 2014-Ohio-4321, ¶ 14. However, "[f]actual circumstances must exist that would prompt or require a landlord to investigate." *Id*. at ¶ 16; *Robinson v. Akron Metro. Hous. Auth*., 9th Dist. Summit No. 20405, 2001 Ohio App. LEXIS 3374, (Aug. 1, 2001). Notably, the open and obvious doctrine does not eliminate the landlord's duty under the statute. *Carter* at ¶ 16.

{¶16} In the instant case, the record reveals that although there were two staircases, the DeFreezes declined to use the front staircase. DeFreeze testified that she stepped in the dark and fell on the back stairs due to defective stair treads. She provided photographs showing the missing and misaligned treads. Lynch noted that the photos were undated, and Damon admitted

that he removed the treads after the second fall. Lynch and Summers testified that the property was properly maintained and the back stairway was not defective. In addition, the written notice of defects did not list the stair treads. The jury's verdict indicates that it chose to believe Lynch and Summers, which they were permitted to do. *Sikora* at syllabus. *Accord Waugh*, 8th Dist. Cuyahoga No. 100432, 2014-Ohio-1087. We cannot say that the jury clearly lost its way when it resolved this issue against DeFreeze on both the common law negligence and the R.C. 5321.04 negligence per se claims.

{¶17} As to the claim of retaliatory eviction, we note that under R.C. 5321.02, a tenant may defend an action for possession of premises on the grounds that the landlord is pursuing the action in retaliation for the tenant's R.C. 5321.04 complaints. *K&D Mgt., L.L.C. v. Masten*, 8th Dist. Cuyahoga No. 98894, 2013-Ohio-2905, ¶ 14. However, notwithstanding R.C. 5321.02, a landlord may initiate a forcible entry and detainer action under R.C. 1923.02 against a tenant holding over his or her term. *K&D Mgt*.

{¶18} Here, DeFreeze asserted that they were given the three-day notice terminating the tenancy in retaliation for reporting the falls to Lynch. Lynch testified that by 2014, the DeFreezes were in a month-to-month tenancy, and after the June 2014 rent check was returned for insufficient funds, Lynch informed the DeFreezes that they had to leave. Lynch stated that he posted another notice to leave in December 2014 due to nonpayment, and not in retaliation for the injury claims. Although the DeFreezes insisted that the nonpayment began after they put their rent in escrow, court documents show rent escrow commenced in September 2015, so it was not a defense to 2014 nonpayment of rent. From all of the foregoing, we cannot say that the jury lost its way in concluding that the DeFreezes were not evicted in retaliation for the injury claims.

{¶19} The first assigned error lacks merit.

Judgment Notwithstanding the Verdict

{¶20} In the second assigned error, DeFreeze asserts that the defense verdict should have been set aside because reasonable minds could only find in her favor on the claims for relief.

{¶21} We review a trial court's ruling on a motion for judgment notwithstanding the verdict de novo. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 4. Judgment notwithstanding the verdict pursuant to Civ.R. 50(B) "is proper if upon viewing the evidence in a light most favorable to the non-moving party and presuming any doubt to favor the non-moving party reasonable minds could come to but one conclusion, that being in favor of the moving party." *Williams v. Spitzer Auto World, Inc.*, 9th Dist. Lorain No. 07CA009098, 2008-Ohio-1467, ¶ 9. If, however, there is substantial evidence to support the non-moving party's side of the case, upon which reasonable minds may reach different conclusions, the motion for judgment notwithstanding the verdict must be denied. *Jackovic v. Webb*, 9th Dist. Summit No. 26555, 2013-Ohio-2520, ¶ 15; *Osler v. Lorain*, 28 Ohio St.3d 345, 347, 504 N.E.2d 19 (1986). When considering a motion for judgment notwithstanding the verdict, a court must consider neither the weight of the evidence nor the credibility of the witnesses. *Osler* at syllabus.

{¶22} In this matter, there is substantial evidence to support the defense verdict, as there was testimony disputing the existence of defects and retaliation. Accordingly, the motion was properly denied. *Accord Coeurvie*, 9th Dist. Summit No. 27095, 2017-Ohio-2634, ¶ 29. The second assigned error is without merit.

Motion for a New Trial

{¶23} In the third assigned error, DeFreeze argues that the trial court abused its discretion in denying her motion for a new trial because: (1) she learned during the post-trial contempt

hearing that Lynch repeatedly lied to the court about his failure to appear at a previously scheduled trial date, and this misconduct is a basis for impeachment of his credibility in the injury action; and (2) defense counsel impermissibly argued that DeFreeze suffered no economic loss. Essentially, DeFreeze maintains that there has been an irregularity in the proceedings that prevented her from having a fair trial.

{¶24} Civ.R. 59 governs new trial motions. As is relevant herein, a new trial is warranted upon a finding of sufficient prejudicial error that deprives the movant of a fair trial, misconduct of the prevailing party, or accident or surprise which ordinary prudence could not have guarded against. Civ.R. 59(A)(1)-(3). To obtain a new trial on grounds of misconduct or irregularities at trial, the movant must establish the presence of serious irregularities in the proceedings that deprived the party of a fair trial, such as those that could have a material adverse effect on the character of and public confidence in judicial proceedings. *Gagliano v. Kaouk*, 8th Dist. Cuyahoga No. 96914, 2012-Ohio-1047, ¶ 11. However, "'motions for new trial are not to be granted lightly.'" *Elsner v. Birchall*, 8th Dist. Cuyahoga No. 106524, 2018-Ohio-2521, ¶ 10, quoting *State v. Jerido*, 8th Dist. Cuyahoga No. 72327, 1998 Ohio App. LEXIS 730 (Feb. 26, 1998). We review a decision regarding a motion for a new trial under Civ.R. 59(A)(1), (2), or (3) for an abuse of discretion. *Sydnor v. Qualls*, 2016-Ohio-8410, 78 N.E.3d 181, ¶ 41 (4th Dist.). *Accord Gagliano* at ¶ 10; *Kassay v. Niederst Mgt.*, 8th Dist. Cuyahoga No. 106016, 2018-Ohio-2057, ¶ 40-41.

{¶25} The time line of events in this matter shows that Lynch failed to appear at the first scheduled trial date, January 17, 2018. The matter was tried to a defense verdict two weeks later, starting on January 31, 2018. Approximately one week after the verdict, the trial court ordered Lynch to appear at a contempt hearing the following month. The evidence disclosed at the

contempt hearing revealed that Lynch lied to the court when he claimed that he could not attend the first scheduled trial date due to his mother's hospitalization.

{¶26} DeFreeze asserts that Lynch's lies in connection with his failure to appear are probative of whether he lied in defending the notice, defect, and retaliation claims at trial. We note that a court has a clear duty to grant a new trial where it appears probable that a verdict is based on false testimony where it appears probable that a verdict is based upon the false testimony. *Markan v. Sawchyn*, 36 Ohio App.3d 136, 138, 521 N.E.2d 824 (8th Dist.1987), citing *Tanzi v. New York Cent. RR. Co.*, 155 Ohio St. 149, 153, 98 N.E. 2d 39 (1951). Here, DeFreeze did not show that it was probable that Lynch's trial testimony was false, as the uncovered lies pertained to his nonappearance at trial. The falsity was not material to the allegations at trial. There has been no indication that any of his trial testimony was false, and moreover, even discarding Lynch's testimony for purposes of argument, it is clear that DeFreeze's claims were contradicted by Summers and the documentary evidence presented. *Accord Seibert v. Murphy*, 4th Dist. Scioto No. 02CA2825, 2002-Ohio-6454; *Silver v. Jewish Home of Cincinnati*, 190 Ohio App.3d 549, 2010-Ohio-5314, 943 N.E.2d 577, ¶33 (12th Dist.).

{¶27} Moreover, insofar as DeFreeze asserts that she is entitled to a new trial on the basis of newly discovered evidence, we note that she must show: (1) the new evidence will probably change the result; (2) the evidence was discovered since the trial; (3) the evidence could not, in the exercise of due diligence, have been discovered before the trial; (4) the evidence is material to the issue; (5) the evidence is not merely cumulative; and (6) the evidence does not merely impeach or contradict the former evidence. *Schwenk v. Schwenk*, 2 Ohio App.3d 250, 253, 441 N.E.2d 631 (8th Dist.1982).

{¶28} Here, we conclude that the trial court did not err in ruling that the evidence disclosed in the contempt hearing did not warrant a new trial. There was no indication that Lynch's trial testimony was untruthful at trial, and it was supported by testimony from Summers. The newly discovered evidence of Lynch's statements that were the basis for the contempt citation, while probative of his credibility concerning the reason for his failure to appear at the originally scheduled trial date, does not suggest that a new trial would produce a different outcome as to DeFreeze's claims at trial, and would have simply been used for purposes of impeaching Lynch's overall credibility. Accordingly, the trial court did not abuse its discretion in denying the motion for a new trial.

{¶29} The third assigned error is without merit.

{¶30} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

EILEEN T. GALLAGHER, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR